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IN THE

Supreme Court of the United States

October Term, 1935

No. 197

UNITED STATES OF AMERICA

Petitioner

v.

LOUIS H. PINK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION IN BEHALF OF RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE CO. ESTABLISHED IN 1827

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The Opinions Below

No opinion was rendered by the District Court in this case, it having been decided on the authority of the decisions in *United States of America* v. *Bank of New York and Trust Company* and *United States of America* v.

President and Directors of the Manhattan Company, which are sought to be reviewed simultaneously with this case, and which are numbered 195 and 196, respectively. They are reported in 10 Fed. Supp. 269. The opinions of the Circuit Court of Appeals (R. 122-123) have not yet been reported.

Questions Presented

1. Whether title based upon Soviet decrees of confiscation to private property which has always been located in the State of New York and which has never been in the possession or control of any Russian government will be recognized or enforced by our Federal courts, particularly when the highest court of the State has denied extraterritorial effect to such decrees as contrary to its public policy.

2. Whether by the exchange of letters dated November 16, 1933, between the President and the People's Commissar for Foreign Affairs of the Soviet Government (R. 57-61), title to the property involved here was intended to be assigned and, if so, whether it was validly assigned to and accepted by the petitioner.

3. Whether the District Court had jurisdiction of this action, the New York State courts having assumed jurisdiction and actual possession of the funds in controversy long prior to the inception of the instant suit, and the Superintendent of Insurance even now carrying on the liquidation pursuant to directions of the Courts of New York State.

4. Whether the complaint in any aspect sets forth a cause of action in equity against the respondent.

The Decisions Below

The bill of complaint was dismissed by the District Court on the authority of *United States* v. *Bank of New York and Trust Company* and the *United States* v. *President and Directors of the Manhattan Company* on the grounds (1) that the Soviet decrees of confiscation have no extraterritorial effect over property which has always been located here, that said decrees are contrary to the public policy of the United States, and that recognition of the Soviet government "in no way changed the confiscatory nature of the decrees in so far as these particular funds were concerned"; and (2) that no assignment or transfer of the funds in question was ever made to the United States by the Soviet government.

The Circuit Court of Appeals affirmed the orders of the District Court, on the ground that the Federal court had no jurisdiction of the cause of action, the New York State courts having long since assumed jurisdiction and possession of the funds. The opinion of the dissenting judge of the Circuit Court of Appeals expresses the view that by virtue of our recognition of the present Russian Government, the Soviet decrees, admittedly confiscatory in nature, retroactively and extraterritorially vested title in the Soviet Republic over assets always situated in New York. In *Lehigh Valley R. Co.* v. *State of Russia* (21 Fed. [2d] 396, 401; certiorari denied, 275 U. S. 571), the same judge, speaking for the unanimous court, decided directly to the contrary and held that the only acts validated by recognition of Russia were those performed in its own territory.

Statement

On November 14, 1934, the instant suit was commenced. Long prior to that time, however, the Superintendent of Insurance, pursuant to an order of the Supreme Court of the State of New York, New York County, dated August 8, 1925, as resettled by an order dated September 11, 1925, took possession of the assets of the United States Branch of the First Russian Insurance Company, pursuant to Section 63 of the Insurance Law of the State of New York. Pursuant to orders and directions of the said Supreme Court, the Superintendent of Insurance, as liquidator, investigated, ascertained, fixed and determined the claims of policyholders and creditors in the United States and paid such of said claims as were found to be valid (R. 64). A substantial surplus of assets belonging to said company then remained in possession of the liquidator, concerning the disposition of which long, tedious litigation ensued in the courts of the State of New York. Finally, the Court of Appeals of the State of New York, speaking through Chief Judge CARDOZO, by its decision handed down on February 10, 1931, and reported in 255 N. Y. 415, *et seq.*, directed that such surplus funds, after payment of policyholders and creditors of the United States Branch of said company, should be applied by the liquidator to the payment of all valid claims against the First Russian Insurance Company arising from business transacted by the said company *outside of the United States*, and that any surplus then remaining should be then available for foreign attaching creditors, and that any further surplus should then be paid and delivered to the First Russian Insurance Company as rep-

resented by its surviving directors (R. 64). (Italics throughout are ours.) Pursuant to the order of the New York Supreme Court (R. 65, 81-82) entered as directed by the New York Court of Appeals (*supra*) in this proceeding, the liquidator proceeded forthwith to determine the claims of foreign creditors of said company filed with him.

Up to this point the facts in this case are identically the same as those in the *Bank of New York and Trust Company* and *President and Directors of the Manhattan Company* cases. All three companies were being liquidated by the Superintendent of Insurance, pursuant to orders of the Court of Appeals rendered on its decisions in 255 N. Y. 415, *et seq.* In the *Bank of New York* and the *Manhattan Company* cases comparatively few foreign claims were filed with the liquidator, and, after payment thereof, the liquidator, pursuant to the orders of the Court of Appeals, turned over the surplus assets in the case of the Moscow Company to the Bank of New York and Trust Company, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, and in the case of the Northern Insurance Company the liquidator turned over the remaining surplus assets, after payment of the filed foreign claims, to the President and Directors of the Manhattan Company. Thereafter, in those two companies supplementary suits were begun, outside of the liquidation proceedings, in the New York Supreme Court, the object of which was to determine the disposition of such funds. In the *Bank of New York and Trust Company* case (Moscow Company) such supplementary suit had proceeded to judgment prior to the commencement of the suit against it by the petitioner (*R. Bank of New York and Trust Co.* case, 1, 78, 103).

At this point, however, the facts regarding the First Russian Insurance Company differ materially from those in the *Bank of New York* and the *Manhattan Company* cases. In the instant case the liquidator, pursuant to the decision of the New York Court of Appeals (255 N. Y. 415), proceeded forthwith to determine the claims of foreign creditors of said company filed with him, *and certain of said foreign claims were allowed by the liquidator and payments on account thereof as allowed were made in December, 1933, pursuant to orders of the New York Supreme Court* (R. 65). In this respect the petitioner is in error in stating on page 7 of the petition that only domestic claims have been paid in this proceeding. Other foreign claims against the said company were disallowed by the liquidator *and are now being heard before a referee appointed by the New York Supreme Court* (R. 65), who has been hearing many claims, and who has not yet filed his reports. *The liquidator is still conducting the liquidation pursuant to orders of the New York Supreme Court* (R. 65, 81-90, 91-102).

ARGUMENT

POINT I

Public Policy and Retroactive Validity of Soviet Decrees

The bill of complaint affirmatively states that the title of the petitioner is based upon Soviet confiscatory decrees (R. 5, 6). The decrees themselves show their confiscatory nature (R. 41-51) and the opinions of the court below specifically held these decrees to be confiscatory (R. Bank of New York, Trust Co. 168; this R. 128).

During the time when proceedings were being had in the courts of the State of New York in the liquidation of this and other Russian insurance companies, the Court of Appeals of that State authoritatively declared time and again both before and after recognition that the Soviet decrees, admitted by the petitioner to be confiscatory, were contrary to the public policy of the State of New York, shocking to its sense of justice and equity, and would not be enforced. The New York Court of Appeals has further held that the Soviet government acquired no title to any assets in the State of New York of former Russian corporations, such title being based on the identical Soviet decrees through which the petitioner herein relies for its title (*Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 378-379; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257). In *Vladikavkazsky Ry. Co.* v. *New York Trust Co.* (*supra*), decided after recognition of the Soviet government by the United States, the New York Court of Appeals in no uncertain terms clearly set forth the public policy of the State of New York. That Court said, at pages 378, 379:

> "It is hardly necessary to state *that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts* (citing Baglin *v.* Cusenier, 221 U. S. 580)."

The funds in suit having always been within the State of New York, and the highest court of said state having

declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforceable (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, and *James* v. *Second Russian Ins. Co., supra*), the Federal District Court in New York was under the duty of administering the law as so declared by the highest court of the State of New York. The District Court, therefore, is without power or authority to enforce such Soviet decrees over property and funds within the State of New York (*Clark* v. *Williard*, 294 U. S. 211, 213; *Same* v. *Same*, 292 U. S. 112, 123; *City Bank Co.* v. *Schnader*, 293 U. S. 112, 118-119; *Burnet* v. *Brooks*, 288 U. S. 378, 379; *Pennoyer* v. *Neff*, 95 U. S. 714, 722), where the declared public policy of the State of New York has been to deny the effect of Soviet decrees of confiscation over property located in that State.

The public policy of the United States is equally as emphatic and clear, and likewise the Federal courts will not enforce such decrees over property which has always been located within the jurisdiction of our courts (*Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481, 491-492; *Fifth Amendment, Constitution of the United States; Baglin* v. *Cusenier*, 221 U. S. 580; *Bank of Augusta* v. *Earle*, 13 Peters 519, 589; *Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552, 560). The alleged acceptance by the President of the assignment heretofore referred to, and the recognition of the Soviet Republic, in no way declared or determined that Soviet decrees of confiscation and appropriation were not against the public policy of the United States (*Geofroy* v. *Riggs*, 133 U. S. 258, 267). The Executive has no authority to confiscate property, and the question of our public policy in such a case is for the courts and not for the Executive to decide. It is true that our

courts will recognize a transfer of title to personal property according to the law of the domicile, and it is also true that the relationship between members of a corporation to the corporation and to each other are controlled by the law of the jurisdiction under which the corporation was created. It is on such general principles that the petitioner relies, citing *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527. But such rules have no application where the transfer at the domicile is by confiscation or by any other method in violation of our public policy. Where extraterritorial effect is given to a transfer of corporate assets it has without exception concerned transfers pursuant to statutes enacted for the purpose of expediting the proper and equitable distribution of assets of the dissolved corporation, policyholders, creditors or any other interested parties (*Relfe* v. *Rundle,* 103 U. S. 222). Assuming that the Soviet Republic therefore became the statutory successor of the Russian corporations which it nationalized, *it could in no event obtain title to assets located in the United States which would be contrary to the law and public policy of the sovereignty in which such assets are located.* (*Clark* v. *Williard, supra.*)

Confiscation of private property being contrary to our public policy and to our public institutions, it follows that the Soviet decrees of confiscation upon which the petitioner relies have no force or validity with reference to private property which has always been located in this country.

It has been conclusively established that the decrees and acts of the Soviet government have no extraterritorial effect and operation within this jurisdiction. This is so whether or not there has been recognition of the government originally claiming title to the property. Recogni-

tion of the Soviet government by the United States gave no retroactive validity to the Soviet decrees of confiscation in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter.

Lehigh Valley Ry. Co. v. *State of Russia*, 21 Fed. (2d) 396;
Second Russian Ins. Co. v. *Miller, supra;*
Baglin v. *Cusenier, supra;*
Vladikavkazsky Ry. Co. v. *New York Trust Co., supra;*
James v. *Second Russian Ins. Co., supra;*
Frenkel v. *L'Urbaine Ins. Co.*, 251 N. Y. 243.

POINT II

The assignment did not cover these funds. No title to this property has been assigned to and accepted by the petitioner.

We have already shown that the Soviet government, and through it the petitioner, obtained no valid title which our courts will enforce by reason of the decrees of confiscation. The alleged assignment, therefore, contained in the diplomatic letters (R. 57-61) is inoperative (*U. S.* v. *Buford*, 3 Pet. 12, 30). Moreover, an examination of the assignment discloses that it was never the intent to assign the funds or property in suit here. The claims referred to in the letter are intended to mean claims which *preceding Russian governments* might have had because of their transactions in this country, and such claims were par-

ticularly referred to as "due from American nationals, including corporations, companies, partnerships or associations and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims" (R. 58). By its very terms, this purported assignment did not attempt to assign private property situated here. In the same instrument it was agreed that the Soviet government would not make "any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interest therein, in which the Soviet government or its nationals may have had or may claim to have an interest; or acts done or settlement made by or with the United States or public officials in the United States or its nationals relating to property, credits or obligations of any government of Russia or nationals thereof" (R. 58).

Thus the very terms of the letter disclaim interference with the fund involved in this case, for in the suit at bar we have the defendant, a public official of the State of New York, administering the fund pursuant to orders and judgments of the New York courts and the laws of that State.

The type of claim undoubtedly intended to be assigned was clearly such a claim as the one involved in *State of Russia* v. *National City Bank*, 69 Fed. (2d) 44, where a former government of Russia had on deposit certain funds with the National City Bank, an American national. It is to such funds which the government may well claim under the assignment, and it is to such funds that the Soviet government, as the successor of prior governments of Russia, acquired title. (See opinion of District Court, *Bank of New York and Trust Company* case [R. 171-172]).

In addition, the title asserted to this property cannot be said to have been accepted through the act of the President. Private property of nationals of the assignor government will always be recognized and protected in the case of diplomatic assignments affecting non-enemy nationals. (*U. S.* v. *Percheman,* 7 Pet. 51, 86-87; *Strother* v. *Lucas,* 12 Pet. 410, 438; *Coffee* v. *Groover,* 123 U. S. 1, 9; *Kinkead* v. *U. S.* 150 U. S. 483).

POINT III

Jurisdiction

The proceedings in the Supreme Court of the State of New York with regard to the funds and assets involved in this suit have been pending since 1925, long prior to the institution of the present suit and the date of the alleged assignment. The possession of this fund by the State Court up to the present time has been continuous and actual since 1925, and, having acquired jurisdiction, its possession cannot be disturbed by process out of another court (*United States Judicial Code,* Title 28, § 379; *Byers* v. *McAuley,* 149 U. S. 608, 614; *Freeman* v. *Howe,* 65 U. S. 450; *Merryweather* v. *U. S.,* 12 Fed. (2d) 407).

The State of New York having acquired jurisdiction and possession of the *res* such possession has been withdrawn from the jurisdiction of all other courts (*Lion Bonding and Surety Co.* v. *Karatz,* 262 U. S. 77). Even where a state court and a federal court have jurisdiction of a matter the court which first acquired jurisdiction retains it until its jurisdiction has been exhausted and its duties discharged in full. (*Peck* v. *Jenness,* 7 How.

624). The New York State Court proceeding, in which the *Superintendent of Insurance was and still is liquidating the affairs of the First Russian Insurance Company,* is unquestionably a proceeding in *rem.* The instant suit is also in *rem,* and under the circumstances the Federal District Court was without any jurisdiction (*Penn. General Casualty Co.* v. *Pennsylvania ex rel. Schnader,* 294 U. S. 189). The federal court, therefore, has no jurisdiction over the *res,* nor can it direct the respondent herein to account (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46).

POINT IV

The bill of complaint fails to state a cause of action in equity.

The bill of complaint first alleges that the First Russian Insurance Company was organized under the laws of Russia and authorized to do business in the State of New York, and that it deposited with the Superintendent of Insurance of New York State, in compliance with its laws, the fund in suit here (R. 5). It next alleges that in the latter part of 1917 said insurance company was dissolved by decree of the Russian State and its assets, including this fund (which has always been located here), were confiscated by the said Russian State (R. 5). It is further alleged that on November 16, 1933, the assets here of the insurance company were assigned to it (R. 8), that a demand has been made, that the defendant has refused to pay over on such demand, and that the defendant holds the assets as trustee for the complainant (R. 8, 9).

Clearly, the action sounds only in conversion and though the relief sought does seek an equitable remedy this, nevertheless, does not make the action one in equity when, in fact, it is an action at law.

Moreover, both the alleged assignee and the assignor, the Soviet government, have been guilty of unpardonable laches. The confiscatory decrees were promulgated in 1917 and 1918. For almost sixteen years, up to November 16, 1933, the date of the purported assignment, the Soviet Government took no action with regard to this property. Further, for one year after the date of the alleged assignment, the complainant, the petitioner here, stood idly by and permitted the New York State court and the liquidator to proceed with the disposition of the fund pursuant to orders and judgments of the State court and has allowed and permitted all parties, including creditors, to rely on the State court orders and judgments. As heretofore shown, many foreign claims have been allowed by the liquidator and the claimants have received some payment thereon. Other claims are now being heard by a referee pursuant to orders of the New York State Supreme Court entered prior to the inception of the present suit (R. 65).

The inexcusable laches of the complainant assignee and the assignor while the liquidation proceeding had progressed to such an advanced stage, bars the petitioner from praying for equitable relief.

When, on August 8, 1925, the Superintendent of Insurance took over the First Russian Insurance Company for liquidation, it was taken over for the benefit of its policyholders, creditors, stockholders and the public wherever situated. The New York State Court of Appeals, by its decision in this proceeding, reported in 255 N. Y. 415, *et*

seq., declared that the claims to be paid in the proceeding were not only to be domestic claims, but also claims of any foreign origin. Hundreds of claimants, including citizens of foreign countries other than Russia, filed claims, most of which have been adjudicated by the New York State courts, and some of which have been paid. If the petitioner were to succeed in this action it would necessarily mean that a gross injustice would be done to those claimants whose claims are now before a referee, for they have not yet been paid anything, though they are on an equal footing with those claimants whose claims were allowed and paid prior to the inception of this suit.

Aside from the fact that on a strictly legal basis the petitioner has no claim, the equities do not in the least favor this petitioner.

Conclusion

The principles of law applicable to this litigation and applied by the courts below have long been well settled. The record raises no question of merit deserving of review on certiorari.

WHEREFORE, it is respectfully submitted that the petition should be denied.

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July, 1935.